Supreme Court, U.S.
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No.

In the Supreme Court of the United States

THOMAS J. SHALLOW
v.
JUDGE THOMAS P. ROGERS,
COURT OF COMMON PLEAS,
RANDEE FELDMAN, ESQ.,
DR. STEVEN COHEN, and
DR. ELIZABETH RICHMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Thomas J. Shallow, *Pro Se*

QUESTION PRESENTED

The federalization of family law is almost complete while the government intrusion into the lives of families and children goes unabated. Judges, court-appointed lawyers, forensic experts and others enjoy a free reign over the lives of American adults and children inside and outside the home. Several examples of this federalization include: the Social Security Amendments of 1975 that enacted Title IV-D of the Social Security Act, The Child Support Amendments of 1984, Bradley Amendment to Tile IV-D, Family Support Act of 1988, Child Support Recovery Act of 1992, Full Faith and Credit for Child Support Orders Act, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Parental Kidnapping Prevention Act of 1980, The Hague Convention on the Civil Aspects of International Child Abduction, International Child Abduction Remedies Act, The Full Faith and Credit To Protection Orders Act, and numerous others. The Third Circuit dismissed a §1983 challenge to a judge's co-counseling a case and enforcing a contract by incarcerating a non-custodial litigant. The question presented is whether officers of the court may intrude into Americans' lives unabated under color of federal family law, and whether 42 USC §1983's judge-made prohibition cloaking these officers in "judicial immunity" should be rescinded and civil liability for court misconduct be allowed.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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Ankenbrandt v. Richards, 504 U.S. 689 (1992);
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PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Thomas J. Shallow respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unpublished, and is reprinted in the Appendix, at 1. The decision of the United States District Court for the Eastern District of Pennsylvania is designated for publication but is not yet reported, and is reprinted in the Appendix, at 2. The order denying Petitioner's request for rehearing *en banc* is reprinted in the Appendix, at 3.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was filed on October 27, 2006. On November 1, 2006, Petitioner Shallow filed a timely request

for panel rehearing and rehearing *en banc*. The petitions for panel rehearing and rehearing *en banc* were denied by orders dated November 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

42 U.S.C. § 1983, commonly referred to as "Section 1983" provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State ... , subjects, or causes to be subjected, any citizen ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress ....

Amendment XIV, U.S. Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment V, U.S. Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service

> in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SUMMARY

At issue in this case is the constitutionality, application, construction and interpretation of 42 U.S.C. §1983. In the nineteenth century, the Ku Klux Klan enjoyed immunity. Today, judges do.

State Court Judge Thomas P. Rogers improperly jailed Plaintiff Thomas J. Shallow for failing to participate in a court ordered psychological evaluation and conditioning his release on undergoing and paying for the evaluation. Judge Rogers was treating an otherwise good non-custodial father as a bad litigant loath to follow judicial orders.

Judge Rogers in effect stepped off the bench and co-counseled the case with Shallow's opponent's attorney. Judge Rogers coerced Shallow to pay for a custodial evaluation. Judge Rogers became a collection department for the psychologist.

Shallow does not have to submit to court-appointed psychological evaluations and Judge Rogers cannot make a custodial decision based on that denial. Nevertheless, Judge Rogers overstepped his authority and violated Shallow's civil rights.

The catalyst for the enactment of §1983 was the "campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying citizens their civil and political rights." *Wilson v. Garcia*, 471 U.S. 261, 276

(1985). The following quote from Representative Lowe of the 42nd Congress is illustrative:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishing have been visited upon unoffending American citizens, the local administrators have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime and the records of public tribunals are searched in vain for any evidence of effective redress.

This law was passed for the express purpose of Americans to civil remedies whenever their government abuses them in violation of the U.S. Constitution.

Section 1983 provides that every person, not only a limited class of people, for example police officers, who under color of any statute, ordinance, regulation, custom, or usage, of any State (federalized family law) ..., subjects, or causes to be subjected, any citizen (parents and kids) ... to the deprivation of any rights (such as contact with their children, or retention of their property and money), privileges (the right to be a parent to their child), or immunities (freedom from judicial coercion) secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress ....

Section 1983 does not strip the federal district courts of jurisdiction over court officers to include judges and appointed personnel, thereby precluding the courts from exercising their constitutionally assigned function of implementing and interpreting the laws made by Congress. Congress has not arrogated to itself the essential function of interpreting and applying the laws of Congress to pending

cases. Judicial immunity has that effect: that no one is there to judge the judges – neither Congress nor the federal judiciary.

The Third Circuit decision failed to connect the federalization of family law with abuses of matrimonial litigants by state court actors. If allowed to stand, the Third Circuit decision will wrap family court abuses in a blanket of immunity. Federal dollars for support enforcement and other, formerly state functions will fund abuses which will generate state acquisition of more federal dollars. Abuses will fuel acrimony between former husbands and wives and create a society that will revolt against the institution of marriage. Non-custodial parents will be chased away from courts they know will incarcerate them for contract breaches or incidental non-compliance with court orders. We are creating a two tier society: the custodial parent and the non-custodial parent. One wins the prize while the other gets enforced in court. Shallow was put behind bars for his own custodial forensic evaluation to do nothing more than strive to win more parenting time with his child. If allowed to stand, the Third Circuit's decision will establish an unlimited precedent for future extra-judicial actions by judges, guardians *ad litem*, children's attorneys, custodial evaluators to dispose of cases pending before them in favor of whichever litigant suits their fancy or lines their pockets. Such a result would undermine the U.S. Constitution's system of checks and balances by allowing judges to play the role of law enforcement and legislature in the disposition of cases, and would undermine the family by wiping away American's liberty interest in being parents to their children as provided for in the 1st Amendment of the U.S. Constitution.

STATEMENT OF THE CASE

Factual Background

A Pennsylvania state court granted Shallow's former wife primary custody of Shallow's children. Shallow

challenged the decision for several years, ultimately appearing before Judge Rogers in the Court of Common Pleas of Montgomery County, Family Division.

In April, 2005, Judge Rogers ordered a fourth psychological evaluation for the entire Shallow family by Defendant Steven Cohen, Ph.D. The order required Shallow to pay fifty percent of the costs of the evaluation. On the record, Judge Rogers informed Shallow he was subject to contempt if he failed to participate in the evaluation.

Shallow refused to see Cohen resulting in Judge Rogers issuing a contempt order. The order directed Shallow to pay Dr. Cohen $2,500 (equivalent to his share of the evaluation fee) and incarcerated him for six months or until payment was made. Shallow entered a contract with Dr. Cohen on June 14, 2005 at which time he asserts he reserved in writing his right to object to the contract.

Judge Rogers ordered Shallow to execute a "clean" agreement, which Shallow asserts required him to delete his reservation to the contract. Shallow retained Dr. Monty Weinstein to examine whether any impropriety took place in the psychological assessment ordered by Judge Rogers and conducted by Dr. Cohen. Dr. Weinstein allegedly found ethically questionable aspects of the evaluation and drafted a letter to Dr. Cohen regarding the evaluation.

DECISIONS BELOW

The District Court's Holding

The court below held that because Plaintiff's federal claim was inextricably intertwined with the state based case (based upon abstention doctrine outlined in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *D.C. Circuit Court of Appeals v. Feldman*, 460 U.S. 462 (1983)), it refused to hear Shallow's case.

The court below held that Shallow's complaint failed to state a claim under Federal Rule of Civil Procedure §12(b)(6).

The court held that the Pennsylvania Court of Common Pleas enjoys Eleventh Amendment Immunity and is therefore immune to suit.

The court below held that Judge Rogers enjoys judicial immunity: that immunity is overcome only if a judge acts outside his judicial capacity or in complete absence of jurisdiction, and that enforcing a retainer of a court appointed psychologist by incarceration is within the judge's jurisdiction. The court below held that even if the judge acts maliciously or corruptly, he is cloaked in immunity.

The court below held that Pennsylvania law extends immunity to Dr. Cohen and Dr. Richman even though both refused to provide assessment data to Shallow's privately retained expert for his review. The District Court held the court-appointed evaluators were entitled to judicial immunity because they acted as arms of the court.

The Third Circuit Court's Holding

The Third Circuit agreed to the extent of affirming the District Court's dismissal based upon notions of judicial immunity, but not on the basis of the Rooker-Feldman Doctrine. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983).

A motion for rehearing was denied.

Reasons for Granting the Writ

No where within the four corners of 42 United States Code §1983 is it optional that a federal court hear a civil rights case involving a judge, court-appointed personnel or other court officers.

Indeed, U.S. District Courts and the U.S. Courts of Appeals do not have appellate jurisdiction over cases tried in

state courts. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) ("If the decision [of a state court] was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. [citations omitted] Under the legislation of Congress, no court of the United States other than this [U.S. Supreme] court could entertain a proceeding to reverse or modify the judgment for errors of that character. [citation omitted]"); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) ("... a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this [U.S. Supreme] Court."). *Schmitt v. Schmitt*, 165 F.Supp.2d 789, 793-97 (N.D. Ill. 2001) (sanctioning husband for filing frivolous complaint), *aff'd*, 324 F.3d 484, 485-86 (7th Cir. 2003). *See also*:

Alpern v. Lieb, 38 F.3d 933 (7th Cir. 1994);
Datka v. Kennedy, 1995 WL 261119 (7th Cir. 1995);
Powell v. Powell, 80 F.3d 464, 466-67 (11th Cir. 1996);
Foroohar v. Supreme Court of State of Illinois, 1997 WL 661180 (7th Cir. 1997);
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Shallow does not seek appellate review; he seeks original jurisdiction on narrow and specific federal questions: violations of his 14th Amendment Due Process among others and federal statutes as follows.

The federalization of domestic relations law nationwide started with the Social Security Amendments of 1975 that enacted Title IV-D, 42 USC §§661-669, does not limit legal action to only state courts.

Federalization of family law started in the mid-1990s and has not stopped. Federal Offices of Child Support Enforcement (OCSE) were authorized to promulgate child support standards that states had to meet or lose 5 percent of federal Aid for Dependant Children. If, on the other hand, a state's enforcement program met federal standards, 75 percent of the program's cost was paid out of HEW funding. There are cases nationwide making the press that non-custodial parents are having their incomes overcalculated so as to cripple them financially. The hiring of a forensic accountant to "plus up" the income of a sole proprietor, for example, leads to the financial ruin of that individual because of over payment of child support. The improper incarceration of that person for non-payment of child support is not actionable in federal court?

In 1986, the Bradley Amendment to Tile IV-D (42 USC §666(a)(9)) directed states to enact laws that prohibit retroactive reduction of a child support arrearage stemming from a court order. This means that the custodial parent holds the key to the waiver of arrears. If the custodial parent absconded with the child and arrears are based on the parent's disappearance, a federal court cannot hear the case?

Congress next enacted the "Family Support Act of 1988." Abuse of the provisions of this act are limited to state courts? A state judge who swings custodial decisions so as to put ordinary citizens into the child support database cannot be sued in federal court?

The federal "Child Support Recovery Act of 1992" made it a federal crime to willfully fail to pay a past-due support obligation with respect to a child who resides in another state. Added Oct. 25, 1992. Amended Oct. 11, 1996, Title VI, 607(l). Again, what if the custodial parent abducted the child to another state and remained hidden, a federal court cannot hear the matter against the custodial parent?

In 1994, Congress adopted the "Full Faith and Credit for Child Support Orders Act," which requires each state to enforce a child support order, by a court of another state, that is consistent with the act, according to the order's own terms, and not to permit a modification of such an order except in accordance with the act. What if a state court oversteps these bounds and gerrymanders the contents of an order. There is no recourse to federal court?

The "Personal Responsibility and Work Opportunity Reconciliation Act of 1996" made further amendments to Title IV-D, which will have effects into the next century. For a state to remain eligible for the federal funding of child support enforcement, it must have had in effect the Uniform Interstate Family Support Act ("UIFSA"). Congress also amended the "Full Faith and Credit for Child Support Orders Act" and amended Title IV-D to require states to adopt expedited administrative and judicial procedures for establishing paternity and for establishing, modifying and enforcing support obligations. What if the provisions of UIFSA were bastardized: again there is no recourse to federal court?

Federalization has not been limited to child support laws. It has been extended into the custody area as well. The "Parental Kidnapping Prevention Act of 1980", 28 USC 1738A, has preempted state law as to child custody jurisdiction. Because of the Supremacy Clause of the federal Constitution, the Parental Kidnapping Protection Act controls and supersedes any inconsistent state law, including the Uniform Child Custody Jurisdiction Act, which is in effect,

with slight variations, in all 50 states. What if a domestic relations tribunal assist in a parental kidnapping. That tribunal is immune to federal suit?

The Hague Convention on the Civil Aspects of International Child Abduction was ratified by Congress on July 1, 1988. Its objective is to deter international child abduction and to provide a mechanism for the prompt return of abducted children to their home country where the tribunals there can resolve the custody issues on the merits.

The "International Child Abduction Remedies Act," whose provisions are additional to those of the treaty, also took effect on July 1, 1988. Its purpose was to establish procedures for implementing the treaty in the United States and to empower courts in the United States to determine only rights under the convention and not the merits of any underlying custody dispute. Amended at 42 USC §§11601-10; See 42 USC §11601 (b) for the congressional intent.

The Act (*See* 42 USC §11606) grants concurrent jurisdiction to federal and state courts to enforce the Convention.

The federal "International Parental Kidnapping Prevention Act," which provides criminal penalties for unlawfully obstructing parental rights outside of the United States, was enacted in December 1993. 18 USC §1204.

It, too, is in addition to The Hague Convention and specifically provides that it shall not detract from it. 18 USC §1204 (d).

In the last few years the reach of "federalization" has extended into other areas of family law. For example, in 1994 Congress enacted "The Full Faith and Credit To Protection Orders Act," which requires that any protection order issued by the court of one state or Indian tribe, which is consistent with the act, must be accorded full faith and credit by the court of another state or Indian tribe and enforced as if it were the order of the enforcing state or tribe. 18 USC §2261.

Orders of protection are fertile ground for abuse. *Ex parte* applications for orders of protection serve as eviction notices for innocent spouses. "Violations" of these orders of protections trigger criminal charges. In one sweeping law, the victim spouse has a cloud cast over his head in any further domestic law litigation. Judges are inclined to ignore that a parent is innocent until proven guilty. Instead, judges limit parenting time because of concerns for the safety of the child given the "seriousness" of the allegations - which in most cases are false and contrived. None of this is actionable in federal court?

RECAPITULATION

The District Court had jurisdiction pursuant to the aforementioned federalization of family law based on the above listed federal statues and 42 U.S.C. §1983. At the time Shallow's Petition was filed in the District Court, he and his children were located in Pennsylvania. This Court has appellate jurisdiction over the appeal from the District Court's final order pursuant to 28 U.S.C. §1291.

This Court should exercise plenary review over the legal determination of whether the requirements for the *Rooker-Feldman* abstention have been met and, if so, to review the District Court's decision to abstain for abuse of discretion. *O'Neill v. City of Phila.*, 32 F.3d 785, 790 (3d Cir. 1994).

Federal statutes affecting this case have been explained above.

The *Rooker-Feldman* Abstention Doctrine should not be an obstacle to federal jurisdiction. This doctrine holds that a federal court is not an appeal authority for state court judicial decisions, and that only the United States Supreme Court has that authority. However, nothing in this case is an appeal.

The general rule is that the pendency of a state court proceeding is not a reason for a federal court to decline to exercise jurisdiction established by Congress. *McClellan v. Carland*, 217 U.S. 268, 281-82 (1910).

District Court reflects the understanding that domestic relations are traditionally the domain of state courts, but this does not mean that federal courts prohibit themselves from hearing family law cases.

For example, the United States Supreme Court frequently has heard appeals of cases involving child support payments or child custody issues. *See also*:

Stanton v. Stanton, 429 U.S. 501 (1977), on remand, 564 P.2d 303 (Utah 1977);
Quilloin v. Walcott, 434 U.S. 246 (1978);
Caban v. Mohammed, 441 U.S. 380 (1979);
Little v. Streater, 452 U.S. 1 (1981);
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Ankenbrandt v. Richards, 504 U.S. 689 (1992);
DeBoer by Darrow v. DeBoer, 509 U.S. 1301 (1993);
M.L.B. v. S.L.J., 519 U.S. 102 (1996);
Troxel v. Granville, 530 U.S. 57 (2000).

In the instant matter, the District Court neglected to consider that Shallow's Petition was not one for custody, but rather one for civil rights abuses redressable under 42 U.S.C. §1983 for overreaching in the application of federal statutes impacting upon family law matters, which are federal statutory matters. *See Hazbun Escaf*, 191 F. Supp. 2d at 693 (finding wrongful retention determination, as distinct from custody, is not an important state interest).

It would make federal family law and 42 U.S.C. §1983 meaningless if a federal court abstained in a wrongful retention petition because child custody was being disputed in state court. Federal law explicitly provides the federal courts with jurisdiction to determine jurisdiction over disputes under federal family law. If the District Court's analysis were to be accepted, federal family law would be unenforceable and out of control.

Occasionally in divorce cases there is a serious issue of constitutional law. State courts are inhospitable places to get state statutes, or the common law made by state family courts, declared unconstitutional. The United States Supreme Court often reverses decisions of state appellate courts. If state appellate courts use unconstitutional law in criminal and tort cases, those state appellate courts probably also use unconstitutional law in divorce cases. U.S. District Courts and the U.S. Courts of Appeals do not have appellate jurisdiction over cases tried in state courts. Further, the United States Supreme Court very rarely accepts domestic relations cases. So, in this scheme, if divorce law violated a right in the U.S. Constitution, then we would have no federal judicial forum willing to consider the complaint.

Serious constitutional and social issues in family law are being ignored by courts in the United States. The archaic nature of divorce law in many states patched up incompletely by superceding federal law, the paternalistic nature of many judges in divorce courts who ignore the law and the lack of careful consideration given by overloaded judges in divorce

courts all contribute to a situation that is ripe for injustice and unfairness.

Mr. Shallow went to a state court to litigate the custody of his children; had a roadblock thrown in his path by the imposition of a forensic psychologist whose fee Shallow had to pay; and was incarcerated for refusing to be evaluated by that psychologist. Incarceration for the enforcement of a contract is not routine in the practice of family law and cannot be said to be within the judicial function of a judge. Empowering an ethically bound psychologist to be forced to take a patient is equally not the norm in divorce proceedings. In either case, the incarceration was a violation of due process and has to be heard by the District Court.

The Third Circuit has relied on a notion of judicial immunity to shield judges and court appointed evaluators from immunity for civil rights suits. The notion is misplaced and misapplied.

In the American judicial system, few more serious threats to individual liberty can be imagined than a corrupt judge. Clothed with the power of the state and authorized to pass judgment on the most basic aspects of everyday life, a judge can deprive citizens of liberty and property in complete disregard of the Constitution, be free of federal sanction because of judge-made law protecting a fellow "judge", and subject to mere "discretionary review" on appeal.

This is taking place throughout the Third Circuit especially in matrimonial and family courts where emotions run high and finances run low. Children are stripped of their parents as parents lose contact with their children. It is not atypical that a judge will put up roadblocks for a litigant by assigning redundant forensics and imposing 100% of the fees upon the party the judge wants to lose.

A clever ruse is to force a buddy psychologist to debilitate a litigant with a substantial fee, and then use that

psychologist's work product as an obstacle to achieving a litigation objective in court.

The injuries inflicted may be severe and enduring.

Yet the recent expansion of a judge-made exception to the landmark Civil Rights Act of 1871, chief vehicle for redress of civil rights violations, has rendered state judges immune from suit even for the most bizarre, corrupt, or abusive of judicial acts.

The doctrine of judicial immunity from federal civil rights suits dates only from the 1967 Supreme Court decision in *Pierson v. Ray*, 386 U.S. 547 (1967), which found a Mississippi justice of the peace immune from a civil rights suit when he tried to enforce illegal segregation laws. Until this time, several courts had concluded that Congress never intended to immunize state-court judges from federal civil rights suits. *See*, for example, *McShane v. Moldovan*, 172 F.2d 1016 (6th Cir. 1949).

In the last decade this "doctrine of judicial immunity" has led to a disturbing series of legal precedents that effectively deny citizens any redress for injuries, embarrassment, and unjust imprisonment caused by errant judges.

This is particularly pressing in light of recent federalization of domestic relations law that makes children the central objective of matrimonial litigation. There is offensive use of child support being used: debilitating payments are being awarded as well as litigants being incarcerated for being unable to make those payments.

Consider the following examples.

In 1978, the Supreme Court in *Stump v. Sparkman*, 435 U.S. 349 (1978), relied upon by this Court in its decision and order, held that the doctrine forbade a suit against an Indiana judge who had authorized the sterilization of a "slightly r[illegible]arded" 15-year-old girl under the guise of an appendecto[illegible]y. The judge had approved the operation

without a hearing when the mother alleged that the girl was promiscuous. After her marriage two years later, the girl discovered she was sterile.

In 1980, the Seventh Circuit Court of Appeals in *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980), held a judge partially immune from suit for personally arresting a tenant who was in arrears on rent owed the judge's business associates. At the police station, the judge had arraigned the tenant, waived the right to trial by jury, and sentenced him to 240 days in prison. Six days of this sentence were served before another judge intervened. The Seventh Circuit found the judge immune for arraigning, convicting, and sentencing the tenant but not for conducting the arrest and "prosecution."

In 1985, the Eleventh Circuit Court of Appeals held in *Dykes v. Hosemann*, 776 F.2d 942 (11th Cir. 1985) (rehearing *en banc*), that the immunity doctrine required dismissal of a suit against a Florida judge who had awarded custody of a child to its father, himself the son of a fellow judge. This "emergency" order had been entered without notice to the mother or a proper hearing when the father took the boy to Florida from their Pennsylvania home after a series of marital disputes.

This custodial flip occurred well before the enactment of national child support legislation. Today, the advantaged pre or post-judgment matrimonial litigant is one who has a connection to a judge.

In 1985, the Tenth Circuit Court of Appeals in *Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985), held a federal judge immune who, during a trial, had conducted a secret meeting with prosecutors without notifying the defendant or his attorneys. Expressing concern that the jury would be "intimidated" into a not-guilty verdict, the judge agreed to declare a mistrial after the defense had presented its

case so the government could prosecute anew with full knowledge of the defense's strategies.

In just 20 years, these precedents and others like them have established near-total judicial immunity as a settled feature of American law. Under the current doctrine, any act performed in a "judicial capacity" is shielded from suit. *See Stump v. Sparkman*, 435 U.S. 349, 360 (1978).

Thus, the simple expedient of disguising a corrupt act as a routine judicial function guarantees immunity from suit.

The matter *sub judice* involves a judge enforcing a contract between a court-appointed psychologist and the litigant-appellant by the use of incarceration. Assuming *arguendo* no sinister basis exists for this conduct, at the very least, the litigant-appellant was forced into a tactical nosedive in his case to regain contact with his children.

In no other area of American life are public officials granted such license to engage in abuse of power and intentional disregard of the Constitution and laws they are sworn to defend. Those who are harmed, no matter how extensive and irreparable the injury, are deprived of any method of obtaining compensation. They are confined to disciplinary actions that only rarely result in the judge's removal from office despite the troubling frequency of judicial abuses.

This sweeping fiction is at odds both with American legal history and the Constitution. Congress never intended to exempt state judges from suit when it passed the 1871 Civil Rights Act. Moreover, the judiciary is wrong when it asserts that immunity was a settled doctrine, incorporated into the 1871 Act by implication.

To the contrary, the doctrine in its present form did not exist in the United States or England when the civil rights legislation was passed in 1871. Moreover, the immunity doctrine is inconsistent with the due process clause of the Fourteenth Amendment. Even if the doctrine had existed in

common law, constitutional supremacy dictates that it must bow before the American idea of procedural justice embodied in the guarantee of due process.

The Fourteenth Amendment was enacted soon after the Civil War as a reaction to abuses by Southern officials. *See Pierson v. Ray*, 386 U.S. 547,559 (1967) (Douglas, J., dissenting) (1871 Act passed in response to Southern lawlessness).

Its effect was no less than a revolution in American law. For the first time, the states were obligated to observe a minimum standard of justice imposed by the federal courts. Previously, the Bill of Rights had bound only the federal government. Absent a direct affront to federal powers, the pre-Civil War Supreme Court had refused to interfere in the judicial proceedings of any state, even to preserve due process rights created by the Fifth Amendment. *See*, for example, *Barron v. The Mayor & City of Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1833), holding that the Fifth Amendment does not apply to state action.

If state courts ignored personal liberties, no redress was possible in the federal courts. When adopted in 1868, the Fourteenth Amendment expressly bound state officials to observe the minimum standards of justice being developed by the federal courts. In time, the Supreme Court held that the amendment's due process clause obligated state courts to obey virtually every provision of the Bill of Rights. Under this evolving concept, due process embodied at least the specific liberties guaranteed by the Constitution. *See Duncan v. Louisiana*, 391 U.S. 145(1968), holding that the Fourteenth Amendment "incorporates" specific provisions of the Bill of Rights.

By the centennial of the Fourteenth Amendment in 1968, state courts were required at a minimum to provide adequate notice and a right to be heard through counsel before deciding the rights or liabilities of any person.

In effect, the Fourteenth Amendment integrated the federal and state courts into a single judicial system adhering to a uniform minimum standard. This new system immediately generated problems without precedent in American law. When state courts asserted jurisdiction over out-of-state residents or their property, the federal courts frequently found themselves called upon to decide the validity of such acts.

Ignoring the underlying due process concerns at first, the Supreme Court tried to resolve the problem with a theory of jurisdiction based largely on pre-Civil War notions of state sovereignty.

Under this conception, the right of a court to exercise its authority over specific persons, its "personal jurisdiction", extended only as far as the state borders and were of no force beyond them. *See*, for example, *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878).

As the 20th century progressed, the Supreme Court soon found the state-sovereignty theory inadequate. New forms of transportation and communication blurred the significance of state boundaries. An increasingly integrated national economy soon made it possible for activities in one state to produce profound disruption in another.

Moreover, the Supreme Court was unable to resolve a perplexing inconsistency in its theory: if state sovereignty was the only issue, then an out-of-state resident could never confer jurisdiction on a state court merely by giving consent. In theory, sovereignty could be waived only by the sovereign that possessed it. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702 n. 10 (1982).

Yet the Supreme Court, bowing to a rule of practicality, consistently had held that a litigant could confer personal jurisdiction on any state court by consent, even if

the consent was implied by out-of-court activities. *See*, for example, *McDonald v. Mabee*, 243 U.S. 90 (1917).

Finally in 1982, the Supreme Court swept aside the sovereignty theory and held that the jurisdiction of state courts was circumscribed solely by the due process clause. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*, 456 U.S. at 702 (1982).

A state court's authority over anyone, including out-of-state residents, was restricted not by political boundaries but by the conception of fair play and procedural justice embodied in the Constitution. *Id.* at 703.

Thus, personal jurisdiction was an aspect of due process. State judicial power was directly limited by individual liberties guaranteed by the Bill of Rights. As an important consequence, the right to challenge improper activities of a state court took on a new and as yet unexplored constitutional dimension.

The Supreme Court's holding that the due process clause limited state courts' power was surprising only in that it had taken so long.

Many legal commentators had argued for years that jurisdiction of state courts over specific people was a due process problem, not a question of the competing sovereignties of two or more states. *See*, for example, Lewis (1983) for a discussion of the historical development of the Supreme Court's theory of state-court jurisdiction.

Indeed, the older sovereignty theory, a relic of pre-Civil War jurisprudence, virtually had ignored an ancient line of English case law extending back to Article 39 of Magna Charta, ancient predecessor of the due process clause. These cases, dealing with the question of judicial immunity, long ago had established virtually the same due process limitation on judicial power announced in 1982 by the Supreme Court.

As early as 1613, English courts had recognized that Article 39 restricted the power of judges. Early English

decisions had found that judges lost immunity from suit for acts clearly beyond their jurisdiction. *See The Case of the Marshalsea,* 77 Eng. Rep. 1027 (K.B. 1613) (no immunity when Court of the *Marshalsea* asserted jurisdiction over persons outside the king's household, its sole jurisdiction). The *Marshalsea* court specifically traced jurisdictional limits to Article 39 of Magna Charta (*Id.* at 1035).

Only in a single area did the English common law grant a broad form of immunity to judges. Recognizing a need to protect judges from the displeasure of the Crown and its ministers, the Star Chamber in *Floyd v. Barker*, 77 Eng. Rep. 1305 (Star Chamber 1608), had held that a judge could not be prosecuted in another court for an alleged criminal conspiracy in the way he had handled a murder trial. In refusing to try the case, the judges of Star Chamber held simply that if the king wished to discipline a judge, the king must do so himself without resort to a criminal prosecution. *Id.* at 1307.

Despite this narrow focus, Floyd frequently is cited as the foundation of the American judicial immunity doctrine. *See*, for example, *Pulliam v. Allen*, 104 S. Ct. 1970, 1975 (1984). The Supreme Court first relied on *Floyd* as a precedent for judicial immunity in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872).

The federal courts' lavish reliance on this Star Chamber decision is puzzling. While the immunity doctrine focuses exclusively on civil liability for judicial acts, *Floyd* is concerned not with liability but with the proper method of disciplining alleged misconduct of judges. Indeed, *Floyd*'s central concern is not judicial immunity at all, but judicial independence from the executive branch of government. The American constitutional system largely has resolved the problem that preoccupied the judges who wrote *Floyd*.

The current American immunity doctrine not only was a serious departure from its common law antecedents but

also broke with early American case law. As early as 1806, the Supreme Court in *Wise v. Withers,* 7 U.S. (3 Cranch) 331 (1806), had recognized a right to sue a judge for exercising authority beyond the jurisdiction authorized by statute. In 1869, one year after passage of the Fourteenth Amendment and long before due process had assumed its modern contours, the Supreme Court made its first effort to define the limits imposed on state judges. The Court held that state judges possessing general powers were not liable "unless perhaps when the acts...are done maliciously or corruptly." *Randall v. Brigham*, 74 U.S. (13 Wall.) 523, 535-36 (1869).

Then in 1872, one year after the civil rights laws were passed, the Supreme Court overruled its earlier dictum and announced that judges would not be liable even for malicious or corrupt acts. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872).

This 1872 expansion of the immunity doctrine was an abrupt departure even from the common law recognized by a majority of the states in the Civil War era. By the time civil rights legislation passed in 1871, only 13 states had granted their judges a broad form of judicial immunity, while six states had found judges unquestionably liable for malicious acts in excess of jurisdiction. "Liability of Judicial Officers" (1969, pp. 326-27 and nn, 29-30).

Eighteen other states had not addressed the issue at all, *Id.* at 327, although many recognized English common law as binding precedent. Thus, from 1869 to 1872 the Supreme Court extended a sweeping form of immunity to state-court judges that a majority of the states themselves would not have recognized under their own law.

Nor was this emerging doctrine recognized by the post-Civil War Congress. Ample evidence shows that Congress intended to make all state officials, including judges, subject to its new civil rights legislation, even in those states recognizing a broad form of immunity. The

congressman who introduced the Civil Rights Act of 1871 announced that his bill was modeled after the Civil Rights Act of 1866, Congressional Globe, 42d Cong., 1st sess. 68 app. (1871) (remarks of Rep. Shellabarger), which had created criminal penalties for anyone engaging in state-sponsored efforts to violate the civil rights of citizens. Indeed, the 1871 Act was written to provide a civil remedy - the right to sue for damages -in every instance in which the 1866 Act offered a criminal penalty. *Id.*

One fact is clear about the 1866 Act: it unquestionably had abolished judicial immunity from criminal prosecution, in effect overruling the precedent in *Floyd.* Partly because of this feature, President Andrew Johnson had vetoed the bill, Congressional Globe, 39th Cong., 1st sess. 1680 (1866) (presidential veto message to Congress), and Congress promptly had overridden the veto amid indignant cries about the tyranny of local Southern officials. During the vote to override, one representative had sharply responded to the President's concern:

> "*I answer it is better to invade the judicial power of the States than permit it to invade, strike down, and destroy the civil rights of citizens, A judicial power perverted to such uses should be speedily invaded. ... And if an officer shall intentionally deprive a citizen of a right, knowing him to be entitled to it, then he is guilty of a willful wrong which deserves punishment.*" *Id.* at 1837 (remarks of Rep. Lawrence).

Others declaimed that immunity for any state official must be abolished because immunity "is the very doctrine out of which the rebellion was hatched." *Id.* at 1758 (remarks of Rep. Trumbull). The debate on the Civil Rights Act of 1871 itself was no less critical of the wrongs perpetrated by Southern officials. In biting rhetoric, one representative characterized local judges in the former Confederate states as

despots prone to violate the rights of Republicans without regard for law or justice. Congressional Globe,, 42d Cong., 1st sess. 394 (1871) (remarks of Rep. Platt).

Many others vehemently agreed. For example: *Id.* at 394 (remarks of Rep. Rainey), 429 (remarks of Rep. Beatty), and 153 app. (remarks of Rep. Garfield).

On three occasions, congressmen plainly stated that state-court judges would be unable to claim immunity under the 1871 Act. *Id.* at 217 app. (remarks of Sen. Thurman), 385 (remarks of Rep. Lewis), and 365--66 (remarks of Rep. Arthur).

Yet another representative expressly noted that the legislation would correct a specific injustice: the use of harassing litigation and unjust prosecutions in Southern courts meant to silence political opponents or chase them from the state. *Id.* at 185 app. (remarks of Rep. Platt).

Despite this evidence from the congressional debates, a majority of the Supreme Court in *Pierson v. Ray*, 386 U.S. 547 (1967), 96 years after the 1871 Act was passed, decided that Congress never had intended to subject state-court judges to suit. Arguing that judicial immunity was "solidly established at common law," the Court presumed that Congress would have incorporated specific language into the statute had it wished to abolish the doctrine.

This perplexing conclusion utterly ignored the remedial purposes of the 1871 Act and the long-standing rule that a remedial statute will be construed liberally to achieve its purpose (*see* Llewellyn 1950).

Not only did the majority offer a complete distortion of congressional intent, *Id.* at 558-67 (Douglas, J., dissenting), but it also decided that the phrase "[e]very person ... shall be liable" meant every person except judges. The 1871 Act provides that "every person" who violates the civil rights of a citizen by acting under state authority is

liable for a federal civil action for money damages. 42 U.S.C. § 1983 (1985).

Yet Congress clearly had intended to remedy a serious injustice being inflicted on innocent people by corrupt local officials, including judges. In effect, the Supreme Court created a new rule of statutory construction that judicial immunity is to be favored over congressional intent, and only express language in a statute will limit the doctrine.

Finally, in 1978 in *Stump* the Supreme Court wielded its ever-expanding immunity doctrine to prevent suit against a state-court judge who had authorized sterilization of a "mildly retarded" 15-year-old girl after her mother had "petitioned" for the sterilization "to prevent unfortunate circumstances." 435 U.S. 349, 351.

The judge had authorized the procedure without a hearing, notice to the girl, or appointment of a guardian ad litem to represent the girl's interests. Id. at 360.

Recognizing that the judge had violated the most elementary principles of due process, the Supreme Court majority nonetheless found him immune from a suit later filed by the girl and her new husband. Even "grave procedural errors" do not deprive a judge of immunity, ruled the Court, because immunity attaches to any act performed in a judicial capacity. The Court noted that the judge had signed the sterilization petition as a judge; and it dismissed objections that failure to observe formalities rendered the act non-judicial.

Instead, the Court concluded that an act is "judicial" if it possesses two traits: first, the act is one normally performed by a judge, and, second, the parties intended to deal with the judge in an official capacity. *Id.* at 360. The Court, however, interpreted the first of its requirements very broadly. The majority noted that the judge in *Stump* possessed "general jurisdiction," the ability to decide any

matter not specifically withheld from him. Since no statute expressly denied him the power to hear sterilization petitions, he was immune even though such a petition was unprecedented in the history of the state and not authorized by any statute. *Id.* at 367-68 (Stewart, Marshall and Powell, JJ., dissenting).

In this way, the Supreme Court excused a gross departure from due process that would have subjected virtually any other state official to suit. The effect was plain: under the doctrine of judicial immunity, a victim can be forced to bear the full burden of a serious, irreparable injury inflicted by a state-court judge in blatant violation of the Constitution.

The *Stump* test for immunity affords no impediment to a corrupt judge. At best, it cloaks a judge with immunity if he merely indicates his official status while performing any act not expressly prohibited by law. One federal appeals court has required the weighing of four separate factors similar to the *Stump* test: (1) whether the act was a normal judicial function; (2) whether the events transpired in the judge's chambers; (3) whether the controversy was then pending before the judge; and (4) whether the confrontation arose directly and immediately out of a visit to the judge in his official capacity. *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972). *See also Dykes v. Hosemann*, 776 F.2d 942, 945--46 (11th Cir. 1985) (rehearing *en banc*) (quoting *McAlester* with approval); *Harper v. Merckle*, 638 F.2d 848, 858 (5th Cir.), *cert. denied*, 454 U.S. 816 (1981) (quoting *McAlester* with approval).

At worst, it offers a road map for corruption with total impunity. Those subject to a corrupt judge's power may find little comfort in the Supreme Court's pronouncements that judicial immunity in effect is a necessary evil, the price to be paid for a "fearless" judiciary. *See Fern v. Ackerman*, 444 U.S. 193 (1979). With power to abridge liberty and seize property and children, state-court judges are the masters of

everyday life in America. They are capable of causing enormous and irremediable harm to someone who, like the 15-year-old girl in *Stump*, simply is not given a chance to protect his or her own interests before the judge irreparably abridges them.

Yet the Supreme Court insists in the strongest of language that a sweeping immunity shield is necessary for an impartial judiciary. Permitting dissatisfied litigants to sue judges, argues the Court, "would contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray,* 386 U.S. 547, 554 (1967). Under this viewpoint, immunity is not for the benefit of the malicious and corrupt but for the benefit of the public, whose best interests are protected by an independent judiciary. *Id.*

If errors are committed, the proper remedy is appeal. *See Pulliam v. Allen*, 104 S. Ct. 1970, 1975-76 (1984). However, a child can age out by the time an appeal is decided. This leads to children who by an act of a corrupt judge can live their youth absent one parent. Further, given the explosion of child abuse cases largely based upon the impact of federal funding, children can lead their lives in foster homes absent both parents.

Few would question the worthiness of such abstract principles as impartiality and fearlessness, even if the Supreme Court's assessment of judicial courage is surprisingly pessimistic. However, high-flying abstractions often serve only to hide the underlying issue, which in this case is the injury a corrupt judge can inflict on innocent people. Congress and the courts must seriously question any device that affords greater protection to the unscrupulous than to the principled. In this instance, the risk of such a disturbing result is very grave. By resort to the current immunity doctrine, an unscrupulous judge could escape liability even for acts of revenge, gross favoritism, improper seizure of property, unjust incarceration, or serious injuries inflicted "in a judicial capacity."

The history of judicial immunity makes the doctrine even more suspect since Congress clearly believed it was imposing liability on local judges under the 1871 Act. *Pierson v. Ray*, 386 U.S. 547,562 (Douglas, J., dissenting) ("every member of Congress who spoke on the issue assumed . . . that judges would be liable").

In summary incarcerations as took place in this case, as for contempt of court, the judge could preserve his immunity by affording the appellant recourse to object to a psychological evaluation by an undesirable psychologist as is the appellant's right under the American Psychological Association's Ethical Guidelines. Otherwise, appellant went to jail as a squeeze to force him to pay the psychologist's bill.

Nothing can be more egregious than forcing a payment to a professional the appellant does not want to be involved in decisions involving his family. This judge stepped out of his robes to act as a collection agent for the psychologist, not a judge incarcerating a contemnor. In any event, the judge violated traditional notions of fair play and substantial justice and should not be immune to a civil rights suit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

CIRCUIT COURT OPINION A-2

DISTRICT COURT DECISION A-8

ORDER DENYING REHEARING A-21

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-2566

THOMAS J. SHALLOW,

Appellant

v.

THOMAS P. ROGERS, JUDGE;
COURT OF COMMON PLEAS;
RANDEE FELDMEN, ESQ.;
STEVEN COHEN, DR.;
ELIZABETH RICHMAN, DR.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 05-cv-06227)
District Judge: Honorable Juan R. Sanchez

Submitted Under Third Circuit LAR 34.1(a)
October 25, 2006

BEFORE: FISHER, CHAGARES and NYGAARD,
CIRCUIT JUDGES.

(Filed October 27, 2006)

OPINION

PER CURIAM

Thomas J. Shallow filed a complaint in the United States District Court for the Eastern District of Pennsylvania. His complaint arises out of Shallow's ongoing child custody battle with his ex-wife in state court. Defendant Judge Thomas P. Rogers ordered Shallow to undergo a psychological evaluation by Defendant Dr. Steven Cohen. Shallow was found in civil contempt for failing to comply with the Court order. He was directed to pay his share of the evaluation fee ($2,500).

Shallow claims that he was forced to undergo this evaluation against his will. He claims that this forced evaluation violated his constitutional and civil rights. Shallow also brought suit against the Court of Common Pleas for failing to properly supervise Judge Rogers. Additionally, Shallow brought suit against Defendant Randee Feldman, Esq.,[1] the attorney for Shallow's ex-wife, as well as Defendant Dr. Elizabeth Richman, a court-ordered psychologist for Shallow's children.

[1] As noted by the District Court, the complaint lists this Defendant's name as Feldmen, even though it appears from the Defendants' briefs that her name is Feldman.

The District Court dismissed the complaint after finding that it lacked subject matter jurisdiction over the complaint pursuant to the Rooker-Feldman[2] doctrine. Alternatively, the District Court found that if the Rooker-Feldman doctrine did not apply, the complaint would still be dismissed for failing to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Shallow filed a timely notice of appeal. We will affirm based upon the District Court's alternative Federal Rule of Civil Procedure 12(b)(6) rationale.[3]

The Rooker-Feldman doctrine deprives a District Court of jurisdiction in some circumstances to review a state court adjudication. See Turner, 449 F.3d at 547. In Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005), the United States Supreme Court emphasized the narrow scope of the Rooker-Feldman doctrine. It held that Rooker-Feldman "is confined to cases brought by state-court

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[2]The doctrine is derived from Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

[3] We exercise plenary review over a District Court's application of the Rooker-Feldman doctrine. See Turner v. Crawford Square Apartments III, L.P. 449 F.3d 542, 547 (3d Cir. 2006). We also exercise plenary review over the grant or a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6). See Williams v. Consovoy, 453 F.3d 173, 176-77 (3d Cir. 2006).

losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." See id. at 484 (emphasis added). Because Shallow's complaint does not complain of injuries caused by the state court judgment regarding the custody battle, Rooker-Feldman is inapplicable. See Turner v. Crawford Square Apartments III. L.P., 449 F.3d 542, 547-48 (3d Cir. 2006). Therefore, we will examine the District Court's alternative holding to determine whether the complaint was properly dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

First, the District Court dismissed the claims against the Court of Common Pleas because it is not a "person" subject to suit under 42 U.S.C. § 1983. We agree. See Callahan v. City of Phila., 207 F.3d 668, 673 (3d Cir. 2000).

Second, the claims against Judge Rogers, and Defendants Cohen and Richman were dismissed pursuant to judicial immunity. Because the analysis differs with respect to these Defendants, they will be separately analyzed. With respect to Judge Rogers, a defendant judge is entitled to judicial immunity from suits under 42 U.S.C. § 1983 that seek money damages for actions performed in his judicial capacity. See Stump v. Sparkman, 435 U.S.

349 (1978). To determine whether an act falls within the range of judicial action, we consider the nature of the act itself, including whether it is a function normally performed by a judge, the expectations of the parties and whether they dealt with the judge in his judicial capacity. See id. at 362. There is no doubt that Judge Rogers' actions fell within the range of judicial action. See Figueroa v. Blackburn, 208 F.3d 435, 443 (3d Cir. 2000) (stating that holding an individual in contempt is an act normally performed by a judge). Thus, Rogers was judicially immune. [4]

The District Court also found that Cohen and Richman were entitled to judicial immunity. We agree. We have previously held that court-appointed evaluators are entitled to judicial immunity because of their integral relationship to the court. See Hughes v. Long, 242 F.3d 121, 127 (3d Cir. 2001). Thus, it follows that Cohen and Richman, both court-appointed psychologists, are entitled to judicial immunity.

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[4] To the extent that Shallow sought injunctive and declaratory relief against Judge Rogers, the claims were also properly dismissed. See 42 U.S.C. § 1983; see also Brandon E. ex rel. Listenbee v. Reynolds, 201 F.3d 194 (3d Cir. 2000) (noting the impropriety of § 1983 suits against a judge where a judge acts as an adjudicator).

Finally, the District Court properly dismissed the claims against Feldmen. Under 42 U.S.C. § 1983. Shallow must show that Feldmen acted under color of state law and denied him a federally protected constitutional or statutory right. Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 277 (3d Cir. 1999)(citations omitted). Feldmen is a private attorney representing Shallow's ex-wife in a custody dispute. Shallow must allege some action by her that is "fairly attributable" to the state. See id. The complaint lacks any such allegations as Feldmen cannot be considered a state actor. Thus, the claims against Feldmen were properly dismissed.

In conclusion, we will affirm. The District Court was not barred by Rooker:Feldman. However, we determine that the District Court properly dismissed the complaint against all of the Defendants based upon its alternative reasoning pursuant to FED. R. CIV. P. 12(b)(6).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS J. SHALLOW	:	CIVIL ACTION
	:	
v.	:	NO. 05-6227
	:	
JUDGE THOMAS P. ROGERS, COURT OF COMMON PLEAS, RANDEE FELDMAN ESQ., DR. STEVEN COHEN, and ELIZABETH RICHMAN	:	

MEMORANDUM AND ORDER

Juan R. Sanchez, .J **April 6, 2006**

Defendants request this Court to dismiss a four-count complaint, which alleges state court Judge Thomas P. Rogers improperly jailed Thomas P. Shallow for failing to participate in a court-ordered psychological evaluation and conditioning his release on undergoing and paying for the evaluation. This conduct, according to Shallow, deprived him of his civil rights and liberty interests. After careful consideration of the various arguments, ranging from the lack of jurisdiction to the applicability of judicial immunity, I will grant the Defendants' motions to dismiss.

FACTS

A Pennsylvania state court granted Shallow's former wife custody of Shallow's children. (Complaint ¶ 14.)

Shallow challenged the decision for several years, ultimately appearing before Judge Rogers in the Court of Common Pleas of Montgomery County, Family Division. (Complaint ¶25.) In April, 2005, Judge Rogers ordered a psychological evaluation for the entire Shallow family by Defendant Steven Cohen, Ph.D. (Complaint ¶ 18; Complaint Ex. A., Order of Apr. 8, 2005.) The order required Shallow to pay fifty percent of the costs for the evaluation. (Complaint ¶ 18; Complaint Ex. A., Order of Apr. 8, 2005.) On the record, Judge Rogers informed Shallow he was subject to contempt if he failed to participate in the evaluation. (Complaint ¶ 19.) Shallow refused to see Dr. Cohen, resulting in Judge Rogers issuing a contempt order. (Complaint ¶¶ 17, 18; Complaint Ex. B., Order of June 8, 2005.) The order directed Shallow to pay Dr. Cohen $2,500 (equivalent to his share of the evaluation fee) and incarcerated him for six months or until payment was made. (Complaint ¶ 22; Complaint Ex. B., Order of June 8, 2005.)

Shallow entered a contract with Dr. Cohen on June 14, 2005, at which time he asserts he reserved in writing his right to object to the contract. (Complaint ¶¶ 23, 24.) Judge Rogers ordered Shallow to execute a "clean" agreement, which Shallow asserts required him to delete his reservation to the contract. (Complaint ¶¶ 25-27; Complaint Ex. E., Order of June 23, 2005.) Shallow retained Dr. Monty

Weinstein to examine whether any impropriety took place in the psychological assessment ordered by Judge Rogers and conducted by Dr. Cohen. (Complaint ¶¶ 28.) Dr. Weinstein allegedly found ethically questionable aspects of the evaluation and drafted a letter to Dr. Cohen regarding the evaluation. (Complaint ¶ 33 - 37.)

Shallow filed a *pro se* Complaint in this Court in December, 2005 asserting various claims for violations of his constitutional and civil rights.[1] He named as defendants

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[1] In the preliminary statement to the Complaint, Shallow asserts various grounds for his causes of action including 42 U.S.C. § 1983 and the First, Fifth, Ninth and Fourteenth Amendments. Three of the four asserted claims for relief, however, fail to identify the specific constitutional or statutory basis. Because Shallow filed this complaint *pro se,* this Court must "liberally construe his pleadings" and "apply the applicable law, irrespective of whether the pro se litigant has mentioned it by name." *Dluhos v. Strasberg,* 321 F.3d 365, 369 (3d Cir. 2003). Accordingly, I find four constitutional grounds and one statutory basis for Shallow's Complaint claims. The first cause of action asserts, by jailing him and coercing him to attend psychological counseling against his will, "Defendant violated [his] civil rights to be free from violations of his liberty interests." (Complaint ¶ 45.) At best, this cause of action involves unlawful incarceration and forced medical treatment, both of which raise Fourteenth Amendment and 42 U.S.C. § 1983 protections. Shallow invokes the equal protection clause of the Fourteenth Amendment in his second claim for relief, alleging "Defendant selectively prosecuted [him] by incarcerating him for refusing to participate in court ordered psychological assessments." (Complaint ¶ 48.) Article I, Section 10 of the Constitution is the only basis for Shallow's third cause of action, asserting "Defendant impaired the obligation of contracts, and enforced a contract by incarceration." (Complaint ¶ 51.) The final claim alleges Shallow was enslaved, which invokes the Thirteenth Amendment's prohibition against slavery and involuntary servitude.

Judge Rogers (Complaint ¶ 6), the Court of Common Pleas for failure to supervise Judge Rogers (Complaint ¶7) and Dr. Cohen for coercing him to participate in a psychological examination against his will (Complaint ¶ 9). Shallow also asserts claims against Randee Feldman, [2] the attorney for his ex-wife, for "putting [him] in jail" and threatening Dr. Weinstein not to testify under fear of some unspecified retaliation (Complaint ¶ 8), and Dr. Elizabeth Rickman, a court-ordered psychologist for Shallow's children, for refusing Shallow access to her therapy notes and information (Complaint ¶ 10).

DISCUSSION

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the subject matter jurisdiction of the court. A party asserting a Rule 12(b)(1) motion may present either a facial challenge or factual challenge. *Medtronic Vascular, Inc. v. Boston Sci. Corp.*, 348 F. Supp. 2d 316, 321 (D. Del. 2004) (citing 2 James W. Moore, Moore's Federal Practice § 12.30[4] (3d ed. 1997)). A facial challenge asserts the complaint allegations are insufficient on their face to invoke federal jurisdiction and requires the court

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[2] The Complaint lists the defendant's name as Feldmen, whereas the defendant's motion to dismiss writes Feldman. I will refer to the defendant as Feldman.

to accept the Complaint allegations as true. *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir. 1977). By contrast, in a factual attack, the challenging party disputes the court's "very power to hear the case." *Id.* In such an attack, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Carpet Group Int'l v. Oriental Rug Imps. Ass'n,* 227 F.3d 62, 69 (3d Cir. 2000) Once subject matter jurisdiction is challenged, the plaintiff bears the burden to establish jurisdiction in fact exists. *Id.*

All the defendants assert a factual challenge to this Court's subject matter jurisdiction based on the *Rooker-Feldman* doctrine.[3] This doctrine prohibits lower federal courts from exercising jurisdiction over claims "'actually litigated in state court prior to the filing of the federal action'" or "'inextricably intertwined with the state adjudication, meaning that federal relief can only be predicated upon a conviction that the state court was wrong.'" *Knapper v. Bankers Trust Co.,* 407 F.3d 573, 580 (3d Cir. 2005) (quoting *Walker v. Horn,* 385 F.3d 321,

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[3] The Rooker-Feldman doctrine derives from two Supreme Court decisions: *Rooker v. Fidelity Trust Co.*, 263 US. 413 (1923) and *D C Circuit Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

329 (3d Cir. 2004)). Only the United States Supreme Court has the authority to directly review a state court's decision. 28 U.S.C. § 1257. "'Although § 1257 refers to orders and decrees of the highest state court, the *Rooker-Feldman* doctrine has been applied to final decisions of lower state courts.'" *Knapper,* 407 F.3d at 558 (quoting *Walker,* 385 F.3d at 329).

Shallow did not actually litigate the federal claims at issue before the Family Court. Therefore, the relevant inquiry here is whether the instant action is inextricably intertwined with the state court action. A federal claim is inextricably intertwined with a state adjudication when "(1) the federal court must determine that the state court judgment was erroneously entered in order to grant the requested relief, or (2) the federal court must take action that would negate the state court's judgment." *Id.* at 581. Thus, a plaintiff is foreclosed from seeking relief in a lower federal court that would "prevent a state court from enforcing its orders." or effectively reverse or void the decision of the state court. *Id.*

Shallow's claims in this case are inextricably tied to his state court adjudication. Judge Rogers's contempt order and mandate Shallow undergo a psychological evaluation are the underlying acts upon which Shallow premises the four causes of action in his Complaint. If this Court were to find Shallow's constitutional and civil rights were violated when

he was held in contempt and later participated in and paid for the court-ordered evaluation, the result would call into question Judge Rogers' decisions, his handling of the family court case, and his ultimate judgment based on the evaluation results. Shallow's requested relief also evidences his federal claims are intertwined with his state court adjudication. In his Complaint, Shallow asks the Court not only to declare the Defendants violated his constitutional rights and enjoin them from violating his civil rights, but also to "free[] him from his obligation under a coerced contract." (Complaint 9.) Granting such relief would necessarily require this Court to overturn Judge Rogers order mandating the court-ordered evaluation, and such a finding would negate the state court's judgment. Shallow's instant lawsuit thus is "inextricably intertwined" with the state court judgment and falls squarely within the category of cases the *Rooker-Feldman* doctrine precludes a federal court from considering. Judicial errors are subject to correction on appeal, and if Shallow believes the decisions of Judge Rogers were made in error, his recourse is to appeal to the Pennsylvania Superior Court. This Court, though, lacks subject matter jurisdiction and must dismiss the Complaint.

Even if the *Rooker-Feldman* doctrine were inapplicable to Shallow's case, this Court would dismiss the Complaint based on Defendants' alternative argument the

Complaint fails to state a claim. The purpose of a motion filed under Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of the complaint. *Holder v. City of Allentown,* 987 F.2d 188, 194 (3d Cir. 1993). When considering a motion to dismiss for failure to state a claim, the court must accept all well-pleaded allegations in the complaint as true and view them in the light most favorable to plaintiff. *Christopher* v. *Harbury,* 536 U.S. 403, 406 (2002); *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1261 (3d Cir. 1994). The court must consider only the facts alleged in the complaint and its attachments, without reference to other items in the record. *Id.* The court may not dismiss the complaint unless the plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

The Court of Common Pleas and Judge Rogers raise a defense of immunity. The Eleventh Amendment bars suits against an unconsenting state brought in federal court. *Seminole Tribe of Fla. v. Florida.* 517 U.S. 44, 54 (1996). Even if the state is not named a party, sovereign immunity is preserved provided the state is deemed to be the real party in interest. In *Benn v. First Judicial District.* 426 F.3d 233, 241 (3d Cir. 2005), the Third Circuit extended Eleventh Amendment immunity to a Judicial District to bar an action under the American with Disabilities Act because the

Commonwealth was a real party in interest. *Benn v First Judicial District.* 426 F.3d 233, 241 (3d Cir. 2005). The court emphasized the Pennsylvania constitution recognizes a Judicial District and its counterparts as state entities and an integral part of the unified state judicial system. *Id.* at 240-41. It therefore follows the Court of Common Pleas, an entity within the Judicial District, is entitled to Eleventh Amendment immunity. Moreover, the Court of Common Pleas does not qualify as a "person" subject to suit under § 1983. *Callahan v. Philadelphia,* 207 F.3d 668. 673 (3d Cir. 2000). Therefore, I will dismiss the claims against the Court of Common Pleas.

With respect to Shallow's claims against Judge Roberts, judges are entitled to absolute immunity from liability for damages as a result of judicial acts. *Stump* v. *Sparkman,* 435 U.S. 349, 356 (1978); *Gallas v. Supreme Court*, 211 F.3d 760, 768 (3d Cir. 2000). Immunity is overcome only if a judge acts outside his judicial capacity or in the complete absence of jurisdiction. *Mireles v.Waco,* 502 U.S. 9, 11-12 (1991). Nothing in the Complaint indicates Judge Roberts acted in any way to lose his immunity. Issuing a contempt order and mandating a court-ordered psychological evaluation are judicial acts a judge performs in the course of judicial proceedings. Judge Rogers had the authority to issue the contempt order and mandate the evaluation and did so as a part

of normal court business in his judicial capacity. Even if Judge Rogers issued his orders unfairly, maliciously or corruptly, he retains his judicial immunity. *Schuler v. Chambersburg,* 641 F. Supp. 657, 659 (M.D. Pa.1986) (stating judicial immunity "may be invoked even if the conduct was in excess of [the judge's] jurisdiction and done maliciously and corruptly"); *Gallas,* 211 F.3d at 769 (holding "immunity will not be lost merely because the judge's action is unfair or controversial"). Moreover, as a matter of law, Shallow is not entitled to injunctive relief because Congress has expressly precluded such relief "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity ...." 42 U.S.C. § 1983; *Brandon E. v. Reynolds,* 201 F.3d 194, 197 (3d Cir. 2000). Judge Rogers is entitled to dismissal of the Complaint against him.

Pennsylvania law also extends immunity to Dr. Cohen and Dr. Richman. In *Hughes v. Long,,* 242 F.3d 121, 126 (3d Cir. 2001), the plaintiff sued a licensed social worker and her supervisor (a licensed clinical psychologist) alleging interference with his familial rights and violations of his civil rights after the professionals evaluated the plaintiff's children, provided a custody recommendation unfavorable to the plaintiff and refused to give the plaintiff the assessment data to provide to an expert the plaintiff hired to evaluate the testing results. The Third Circuit held the court-appointed

evaluators were entitled to judicial immunity because "they acted as 'arms of the court.'" *Id.* Each qualified as a "non-judicial person who fulfills a quasi-judicial role at the court's request," *id.*, and, their functions were "integral to the judicial process, such as gather[ing] information, conduct[ing] an evaluation, and mak[ing] a recommendation to aid the custody determination," *id.* at 127. There is little distinction between *Hughes* and the present case. Shallow has filed suit against Cohen and Richman, both court-appointed psychologists in a child custody proceeding, after he was dissatisfied with Cohen's evaluation and was denied evaluation data from Richman. Like the professionals in *Hughes*, Cohen and Richman acted as "arms of the court" and as such are entitled to judicial immunity and dismissal of the Complaint.

Nor will Shallow's claims survive as to Feldman. Shallow references Feldman only once in the Complaint. In the section identifying the parties, a single paragraph states Feldman "orchestrated" his incarceration related to his contempt charge and threatened Dr. Weinstein. The Complaint is legally and factually deficient because Shallow never explains when or how Feldman played a role in his incarceration, when or how she threatened Dr. Weinstein, or even how the threat relates to his claims. Even if the allegations in the Complaint are sufficient, two other grounds

support dismissal of the Complaint. First, Shallow's civil rights claims are premised upon 42 U.S.C. § 1983, which requires Shallow prove Feldman acted under color of state law and denied him a federally protected constitutional or statutory right. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922. 936 (1982); *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 277 (3d Cir. 1999). Feldman does not qualify as a state actor for § 1983 purposes because she was a private attorney representing Shallow's ex-wife and there are no allegations her actions were "fairly attributable" to the state. *Angelico,* 184 F.3d at 277. Second, Shallow's civil and constitutional claims fail as to Feldman because Shallow cannot establish proximate cause. Feldman's behavior is not the predicate of the ultimate harm Shallow alleges -- being held in contempt and jailed for not participating in the court-ordered psychological evaluation and later complying and paying for the assessment. His alleged injury resulted not from Feldman's actions, but from the rulings of Judge Rogers. The Third Circuit has held such "intervention of independent judicial review" a superceding cause sufficient to break the chain of liability unless a judge "reaches an erroneous conclusion because he or she is misled in some manner as to the relevant facts." *Egervary v. Young,* 366 F.3d 238, 250 (3d Cir. 2004). There is no allegation Judge Rogers issued the contempt order because Feldman

misrepresented facts or other evidence. Rather, the Complaint explicitly states Shallow was incarcerated "for refusing to undergo a psychological evaluation against [his] will." (Complaint ¶ 6.)

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS J. SHALLOW	:	CIVIL ACTION
	:	
v.	:	NO. 05-6227
	:	
JUDGE THOMAS P. ROGERS, COURT OF COMMON PLEAS, RANDEE FELDMAN ESQ., DR. STEVEN COHEN, and ELIZABETH RICHMAN	:	

ORDER

AND NOW this 6th day of April, 2006, Defendants' Motions to Dismiss (Documents 7, 8, 9, and 11) are GRANTED. The Clerk of the Court is directed to close the above-captioned case.

BY THE COURT:

/s/ Juan R. Sánchez
Juan R. Sánchez, J.

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UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 06-2566

THOMAS J. SHALLOW,

Appellant

v.

THOMAS P. ROGERS, JUDGE;
COURT OF COMMON PLEAS;
RANDEE FELDMEN, ESQ.;
STEVEN COHEN, DR.;
ELIZABETH RICHMAN, DR.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 05-ev-06227)
District Judge: Honorable Juan R. Sanchez

Present: SCIRICA. *Chief Judge,* AMBRO,
FUENTES, SMITH,
FISHER, CHAGARES and NYGAARD, * *Circuit Judges.*

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* Judge Nygaard's vote is limited to panel rehearing only.

SUR PETITION FOR HEARING

WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ D. Michael Fisher
Circuit Judge

Dated: November 28, 2006

LML/cc: Mr. Thomas J. Shallow
David M. Donaldson, Esq.
Rochelle M. Fedullo, Esq.
James R. Kahn. Esq.
Arthur W. Lefco. Esq.